Supreme Court, U.S.
FILED
OCT 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

Number 87-267

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

D.H. HOLMES CO., LTD.,

Appellant

versus

SHIRLEY McNAMARA,
SECRETARY OF REVENUE AND TAXATION,
THE DEPARTMENT OF REVENUE AND TAXATION,
STATE OF LOUISIANA,

Appellee

ON APPEAL FROM THE COURT OF APPEAL,
FOURTH CIRCUIT,
STATE OF LOUISIANA

MOTION TO DISMISS OR AFFIRM

ROBERT G. PUGH
Counsel of Record
PUGH and PUGH
Suite 1200
330 Marshall Street
Shreveport, Louisiana 71101-3051
(318) 227-2270

ATTORNEYS FOR APPELLEE
SHIRLEY McNAMARA,
SECRETARY OF REVENUE AND TAXATION,
THE DEPARTMENT OF REVENUE AND TAXATION,
STATE OF LOUISIANA

October 14, 1987

MID-SOUTH PRESS, SHREVEPORT, LA

QUESTION PRESENTED

Appellant submitted the following QUESTION PRESENTED in its Jurisdictional Statement Page i:

> Whether provisions of the Louisiana use tax law, La. Rev. Stat. Sections 47:302 (A) (2), 47:305 (E) and 48:321 (A) are violative of the Commerce Clause, Article I, Section 8, Clause 3 of the Constitution of the United States, as applied to assess against appellant a tax on merchandise catalogs sent by United States Mail directly from out-of-state printers to the mailboxes of Louisiana recipients, without appellant ever having any proprietary interest in the catalogs while located in the State of Louisiana.

In the within Motion to Dismiss or Affirm, appellee challenges the accuracy of the concluding phrase in the appellant's QUESTION PRESENTED in that under the laws of Louisiana, appellant was the owner of the merchandise catalogs at the time they came to rest in Louisiana.

LIST OF PARTIES

All parties to the proceedings below and here are the same: D.H. Holmes, Co., Ltd., appellant, and Shirley McNamara, Secretary of Revenue and Taxation, the Department of Revenue and Taxation, State of Louisiana, appellee.

TABLE OF CONTENTS

Page

Question Presented i

List of Parties ii

Table of Contents iii

Table of Authorities iv

Factual Background as Adduced From the Evidence 2

The Judgment Below Rests on an Adequate Non-Federal Basis - The Statutory ["At Rest"] Issue 3

The Appeal Does Not Present A Substantial Federal Question 5

Conclusion 12

TABLE OF AUTHORITIES

Cases — *Page*

Best & Co. v. Maxwell, 311 U.S. 454 (1940) 8

Boston Stock Exchange v. State Tax Commission, 429 U.S. 318 (1977) 8

Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) 8

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) ..... Passim

Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies, 435 U.S. 734 (1978) ..... Passim

District of Columbia v. W. Bell & Co., Inc. 420 A.2d 1208 (D.C. App. 1980) 7, 12

Exxon Corp. v. Wisconsin Department of Revenue, 447 U.S. 207 (1980) 9

Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64 (1963) 8

Henneford v. Silas Mason Co., 300 U.S. 577 (1937) 8

Independent Warehouses, Inc. v. Scheele, 331 U.S. 70 (1974) 11

Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979) 9

Maryland v. Louisiana, 451 U.S. 576 (1981) 8

McNamara v. D.H. Holmes Co., Ltd., 505 So.2d 102 (La. App. 4 Cir. 1987) ..... Passim

Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976) 11

Miller Brothers Company v. Maryland, 347 U.S. 340 (1954) 7, 11

Cases (continued) — *Page*

National Bellas Hess v. Illinois, 386 U.S. 753 (1967) 7

Nelson v. Montgomery Ward & Co., 312 U.S. 373 (1941) 10

Nelson v. Sears, Roebuck & Co., 312 U.S. 359 (1941) 10

Service Merchandise Co., Inc. v. Tidwell, 529 S.W. 2d 215 (Tenn. 1975) 7, 12

Wisconsin v. J.C. Penney Co., 311 U.S. 435 (1940) 9

Constitutions, Statute and Codes

United States Constitution:

Article I, Section 8, Clause 3 ("Commerce Clause") ..... Passim

Louisiana Constitution:

Article 5, Section 10B (Court of Appeal - Scope of Review) 9

Louisiana Statute:

R.S. 47:301, et seq (Louisiana Sales [and Use] Tax Statute) ..... Passim

Page

Louisiana Civil Code:

LA C.C. Art. 481 4
LA C.C. Art. 496 4
LA C.C. Art. 1467 5
LA C.C. Art. 1468 5
LA C.C. Art. 1540 5
LA C.C. Art. 1543 5

Code of Federal Regulations:

United States Postal Service
39 C.F.R. 281
Firm Mailings Damaged or Destroyed Through Transportation Accidents or Catastrophies 5

39 C.F.R. 912
Procedures to Adjudicate Claims for Personal Injury or Property Damage Arising Out of the Operation of the U.S. Postal Service 5

Number 87-267

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

D.H. HOLMES CO., LTD.,
Appellant

versus

SHIRLEY McNAMARA,
SECRETARY OF REVENUE AND TAXATION,
THE DEPARTMENT OF REVENUE AND TAXATION,
STATE OF LOUISIANA,
Appellee

ON APPEAL FROM THE COURT OF APPEAL,
FOURTH CIRCUIT,
STATE OF LOUISIANA

MOTION TO DISMISS OR AFFIRM

Shirley McNamara, Secretary of Revenue and Taxation, The Department of Revenue and Taxation, State of Louisiana ["McNamara"], moves the Court to dismiss this appeal, or in the alternative, to affirm the Judgment of the court below on the grounds that (a) the Judgment below rests on an adequate non-federal basis and (b) the appeal does not present a substantial federal question.

Factual Background As Adduced From the Evidence

D.H. Holmes Company, Ltd., ["Holmes"] is a Louisiana corporation organized in 1905 with its principal office located at 819 Canal Street, New Orleans, Louisiana. Holmes operates a department store at 14 Holmes-owned locations in Louisiana, a majority of which are in New Orleans. Others are in Baton Rouge, Hammond, Houma and Lafayette. Holmes has 5,000 employees, 500,000 charge customers, and a million and a half other customers.

For the purpose of securing business, Holmes has had merchandise catalogs printed and distributed to its customers in Louisiana. In addition to this directly secured business, Holmes indirectly secured business with these catalogs by keeping Holmes' name before the public and thereby encouraging people to shop at Holmes. The Louisiana people to whom these catalogs were to be targeted were pre-determined by the sales promotion manager, and mailed shortly prior to promotional sale dates. Even though Holmes purchased and owned these catalogs, the intended recipient would not know of their existence or that he might recieve a catalog. He could not buy a catalog even if he knew of their existence, for Holmes has a policy prohibiting the sale of their catalogs. The return address used on the catalogs is Holmes' Canal Street address, and it was to this address that some of these catalogs were returned. On its face, the catalog contained the instruction "postal carrier, if the resident [addressee] has moved, please leave this with the current resident." Even though Holmes targeted specific people, Holmes admitted that these specific people may not in fact have received the catalog.

Holmes' catalogs are designed in New York City and then printed at one of three locations, Atlanta, Boston or Oklahoma City. None of these catalogs were printed in Louisiana. They could have been printed here, however, but Holmes sought to evade Louisiana sales tax by printing the catalogs elsewhere. During the taxable period Holmes published nineteen catalogs, four in 1979, six in 1980 and nine in 1981. Eighty-two percent of these catalogs were sent to pre-targeted Louisiana residents. No taxes were paid to New York on these catalogs, nor to Atlanta, Boston or Oklahoma City. The states where these cities are located do not levy a sales tax on the publishing or printing of catalogs. Louisiana does. Having learned from a routine audit that the

cost of these catalogs by taxable year was: 1979 = $520,000; 1980 = $670,000; and 1981 = $834,000, the Department of Revenue and Taxation for the State of Louisiana assessed Holmes for "use tax" pursuant to Louisiana Revised Statute 47:301, **et seq.** Holmes refused to pay the tax and this suit was brought for its recovery. The taxable amount due was stipulated by the parties.

The Judgment Below Rests on an Adequate Non-Federal Basis - The Statutory ["At Rest"] Issue

The court below held, "after the catalogs were in Louisiana mail boxes they were not part of interstate commerce and became part of the property mass in this state. Distribution of the catalogs certainly constitutes 'use' by Holmes under the statute and is subject to the tax." **McNamara v. D.H. Holmes Co., Ltd.**, 505 So.2d 102, 105 (La. App. 4 Cir. 1987). [Jurisdiction Statement Appendix 7A]

In its QUESTION PRESENTED, Holmes asserts that these catalogs were sent "free of charge to the recipients, without appellant ever having any proprietary interest in the catalogs while located in the State of Louisiana."

By so presenting the QUESTION, Holmes begs another question. Under what circumstances and when did Holmes transfer ownership in the catalogs?

The ownership of property rests on state law. By holding Holmes liable for the use tax, the court below answered the ownership question. Holmes owned the catalogs until the non-expecting, pre-designated recipient accepted the catalogs.

> Thus, Holmes owned these catalogs:
>
> During the New York design process;
>
> During the Atlanta, Boston or Oklahoma printing process;
>
> During the mailing process;
>
> At the time they came to rest in Louisiana by placement into the non-expecting, pre-designated recipient's mail or post office box; and
>
> Until the pre-designated recipient accepted the catalog.

In framing it QUESTION PRESENTED, Holmes would want to equate proprietary interest with possession. However, in Louisiana the ownership and possession of a thing are distinct. "Ownership exists independently of any exercise of it [ownership] and may not be lost by non-use." Louisiana Civil Code Article 481.[1]

In commenting on this article, the redactors observed: "The principle developed by this article is necessary in order to show that the right of ownership can be preserved without the exercise of any act of ownership, and without any actual possession on the part of the owner."

The ownership of a thing may be transferred by a sale, an exchange or by a donation. The transfer of ownership of these catalogs from Holmes to the pre-designated recipient did not occur as the result of a sale or an exchange of property. The transfer of ownership from Holmes to the pre-designated recipient was, and could only be, the result of a donation. [Holmes in its QUESTION PRESENTED has acknowledged the transfer to the recipient to have been a donation by stating that the recipient received the catalog "free of charge" a point reiterated at Pages 6, 7, 8, 12, 13 and 15 of Holmes' Jurisdictional Statement.]

---

[1] During one of the taxable years at issue, 1979, this Article was numbered 496 and read:

> The ownership and the possession of a thing are entirely distinct.
>
> The right of ownership exists independently of the exercise of it. The owner is not less the owner because he performs no act of ownership, or because he is disabled from performing any such act, or even because another performs such acts without the knowledge or against the will of the owner.
>
> But the owner exposes himself to the loss of his right of ownership in a thing if he permits it to remain in the possession of a third person for a time sufficient to enable the latter to acquire it by prescription.

Titles I, II and III of Book II of the Louisiana Civil Code were extensively revised by the 1976, 1978 and 1979 Legislatures. These revisions, which encompass C.C. arts. 448 to 645 and replace former C.C. arts 448 to 645 of the Civil Code of 1870, were made on recommendation of the Louisiana State Law Institute.

The Comments relating to Article 481 state:

(a) This provision reproduces the substance of Article 496 of the Louisiana Civil Code of 1870. It does not change the law.

Property can neither be acquired nor disposed of gratuitously, unless by donations **inter vivos** or **mortis causa**, made in the forms hereafter established. Louisiana Civil Code Article 1467. A donation **inter vivos** (between living persons) is an act by which the donor divests himself, at present and irrevocably, of the thing given, in favor of the donee who accepts it. Louisiana Civil Code Article 1468.

A donation produces effects only from the time of its acceptance. Louisiana Civil Code Article 1540. The acceptance can only be made by the donee personally. Louisiana Civil Code Article 1543. There must be "corpus et animus" - the will to enjoy as owner and the fact of enjoyment.

Holmes' catalog official admitted, under examination by the Trial Judge, that if not delivered, these catalogs were returned to Holmes; that the catalogs had a value in excess of their cost; that the ultimate recipient had no way of knowing he was to receive the catalog until he personally accepted it; and that if the catalogs were destroyed in mail by red paint, he did not know what would be Holmes' right to compensation. [As to Holmes' right to recover damages, see, Code of Federal Regulations, United States Postal Service, 39 C.F.R. 281 - Firm Mailings Damaged or Destroyed Through Transportation Accidents or Catastrophies; and 39 C.F.R. 912 - Procedures to Adjudicate Claims for Personal Injury or Property Damage Arising Out of the Operation of the U.S. Postal Service.]

These catalogs having come to rest in Louisiana, while owned by Holmes, and before their acceptance by the non-expecting, pre-designated recipient, the Court below, in applying Louisiana law, was correct in its holding that the catalogs were subject to Louisiana Use Tax.

The Appeal Does Not Present A Substantial Federal Question

Although, admittedly, Holmes posed the Commerce Clause issue in the courts below, it totally failed to adduce any evidence to support its application. Thus Holmes ignored the teachings of this Court that a state tax cannot be invalidated unless its opponents developed a "factual basis on which to declare the tax unconstitutional as applied."

Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies, 435 U.S. 734, 750 (1978).

McNamara, on the other hand, although not required to do so, affirmatively established by competent evidence a factual basis upon which the tax would survive a Commerce Clause attack.

McNamara called as her first witness Representative Claude "Buddy" Leach, an attorney and the Chairman of the Louisiana House of Representatives' Ways and Means Committee [to which Committee all tax legislation must be first referred in the Louisiana Legislative process]. Representative Leach testified as to the satisfaction of the four-pronged requirement whereunder interstate commerce may be required to bear its fair share of state taxation, i.e., the taxes (1) "are applied to activity with a substantial nexus with the State," (2) "are fairly apportioned," (3) "do not discriminate against interstate commerce," and (4) "are fairly related to the services provided by the State."

McNamara's next witness was George Silbernagel, the person from the Louisiana Legislative Fiscal Office who had undertaken an exhaustive study of the distribution of Louisiana Tax Funds to the Orleans area. Mr. Silbernagel was also called to establish the satisfaction in this instance of the four-pronged requirement, with particular reference to the services provided by the State to Holmes, its employees and customers.

In furtherance of this line of testimony, Holmes's catalog official, Stewart Cahn, on cross-examination, admitted that taxes on the catalogs were not paid to any other state. He then admitted that the catalogs were designed in New York, without sales or use tax imposed thereon, then printed and shipped, by United States Mail from one of three states which do not charge a sales/use tax thereon [fairly apportioned test]. Holmes' Vice President, Treasurer/Controller, Paul R. Falter, on cross-examination, admitted that Holmes had 500,000 charge customers and 1,500,000 non-charge customers and also stated that Holmes had 5,000 employees and operated stores in fourteen Louisiana locations, both within and without the Orleans area [the nexus test].

Perhaps the non-discriminatory test can best be illustrated by the following exchange between the trial judge, the Honorable Revius O. Ortique, Jr., and Holmes' counsel concerning an oral motion at the conclusion of the trial for a directed verdict with respect to the catalog issue:

THE COURT:

The other thing is, does D.H. Holmes have a right to or any of the department stores, have a right to circumvent the laws of the State by having its catalogs printed out of state and shipped from out of state? Would a person, if they decided that they were going to let Edward Printing Company, which is a local printing company, do their catalogs and mail them, would that be subject to tax?

MR. RINKER:

Yes, it would, your Honor, there's no question. As a matter of fact, the cases[2] that we cited discussed the distinction between those two possibilities saying that if you print them in the State you pay the taxes and if you buy them from out of state, you don't pay the taxes.

THE COURT:

So, you're saying then in effect, in answer to my other question, that Holmes has control over whether taxes are due on certain items and not the legislature of the State of Louisiana?

MR. RINKER:

To some extent, that's correct.

THE COURT:

All right, the motion is denied. The Court is not satisfied.

The nexus requirement states that there must be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." **National Bellas Hess v. Illinois**, 386 U.S. 753, 756 (1967); **Miller Brothers Company v. Maryland**, 347 U.S. 340, 344-45 (1954). Holmes, a Louisiana corporation, has 14 stores

---

[2] These cases were from other states and either predate this Court's holding in **Complete Auto Transit, Inc. v. Brady**, 430 U.S. 274 (1977), or, if subsequent thereto, make no mention of **Complete Auto Transit's** teachings. Two of these cases, **District of Columbia v. W. Bell & Co., Inc.**, 420 A.2d 1208 (D.C.App. 1980), and **Service Merchandise Co., Inc. v. Tidwell**, 529 S.W. 2d 215 (Tenn. 1975) are cited in the Jurisdictional Statement Pages 11 and 14, and are discussed at Page 12 infra.

in Louisiana, five thousand employees and fifteen hundred thousand customers and an additional 500,000 charge customers. Certainly such a "minimum connection" exists here.

The fairly apportioned requirement relates to the possibility of multiple tax burdens. **See, Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies**, 435 U.S. 734, 746-47 & n. 17 (1978). Here there was nothing to apportion for no taxes were paid elsewhere.

The tax does not discriminate against interstate commerce. Clearly, under the tax, local and interstate commerce are treated alike. This Court has emphasized the importance of judging a tax in operation:

> In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.

Best & Co. v. Maxwell, 311 U.S. 454, 455-56 (1940). In the case of this tax there is "equality of treatment between local and interstate commerce." **Maryland v. Louisiana**, 451 U.S. at 759 (1981); **accord, Boston Stock Exchange v. State Tax Commission**, 429 U.S. 318, 331-32 (1977); **Henneford v. Silas Mason Co.**, 300 U.S. 577, 583-84 (1937). **See** generally, **Halliburton Oil Well Cementing Co. v. Reily**, 373 U.S. 64, 70 (1963) ("equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state"). Holmes during the trial, as previously shown, admitted that if it had chosen to print the catalogs in Louisiana it would be subject to the tax but that it purposely had them printed elsewhere in an attempt to avoid the tax. The taxable rate and thus amount is the same, i.e., if purchased locally (sales tax) it would have been based upon 2% of the cost. The applicable imposition here (use tax) is the same - 2%.

This Court most recently interpreted the services requirement in **Commonweath Edison Co. v. Montana**, 453 U.S. 609 (1981). This Court noted that this part of the four-pronged test "is closely connected" to the nexus requirement. **Id**. at 625-26. This Court concluded:

> When a tax is assessed in proportion to a taxpayer's activities or presence in a State, the taxpayer is shouldering its fair share of supporting the State's provision of "police and fire protection, the benefit of a trained work force, and 'the advantages of a civilized society.'"

Id. at 627, quoting **Exxon Corp. v. Wisconsin Department of Revenue**, 447 U.S. 207, at 228 (1980), in turn quoting **Japan Line, Ltd. v. County of Los Angeles**, 441 U.S. 434, at 445 (1979). Certainly, those services are provided for the use at issue here, just as they are performed for any other sales or use concerning which the state levies a tax. The tax is assessed in proportion to activities or presence.

The appellate court below [**McNamara v. D.H. Holmes Co., Ltd.**, 505 So.2d 102, (La. App. 4 Cir. 1987)], in complying with Louisiana's constitutional mandate [Article 5 Section 10 (b)] that its scope of review extends to both law and facts, concluded that these facts, **id**. at 105-106, [Jurisdictional Statement pages A-8 and A-9] meet the four-pronged test and there is no violation of the Commerce Clause and that the record supports the assessment of use taxes on the Holmes catalogs. **Id**. at 106.

In suggesting to this Court that the question is substantial Holmes states:

> While this Court has decided a number of Commerce Clause tax cases dealing with **activities** relating to commerce, and to **goods** sold for profit and shipped in interstate commerce, before and after they left the stream of commerce, no case decided by this Court addresses the issues presented by this case, or the relationship between these recent cases and this Court's long-established rule that **goods** in interstate commerce are not subject to taxation.

[Jurisdictional Statement, Page 8.]

Holmes seems to be trying to draw a distinction as to goods [catalogs] sold for profit and goods [catalogs] given away [by donation] and to limit the holdings of **Complete Auto Transit, Inc. v. Brady**, 430 U.S. 274 (1977), and **Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies**, 435 U.S. 734 (1978), to activities and not goods (apparently losing sight, as it does so, of the fact that the Court below found the "use" on which the tax would lie, was an activity, i.e. "distribution.")

This Court, almost half a century ago, discouraged any attempt to pigeonhole state tax matters when, in **Wisconsin v. J.C. Penney Co.**, 311 U.S. 435 (1940) it stated:

> A tax is an exaction. Ascertainment of the scope of the exaction — what is included in it — is for the state court. But the descriptive pigeonhole into which a state court

puts a tax is of no moment in determining the constitutional significance of the exaction. "In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect." Henderson v. Mayor of New York 92 U.S. 259, 268. Such has been the repeated import of the cases which only recently were well summarized by the guiding formulation for adjudicating a tax measure, that "in passing on its constitutionality we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it." Lawrence v. State Tax Commission, 286 U.S. 276, 280.

The Constitution is not a formulary. It does not demand of states nor precision of technical phrasing in their exercise of the most basic power of government, that of taxation. For constitutional purposes the decisive issue turns on the operating incidence of a challenged tax. A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society.

Id. at 443-444.

The **Penney** case was followed a month later by the **Nelson** cases, **Nelson v. Sears, Roebuck & Co.**, 312 U.S. 359 (1941), and **Nelson v. Montgomery Ward & Co.**, 312 U.S. 373 (1941). Both of these cases are Commerce Clause Use Tax cases. In the first case against Sears, Roebuck & Co., this Court held:

> In passing on the constitutionality of a tax law "we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it." Lawrence v. State Tax Commission, 286 US 276, 280; Southern P. Co. v. Gallagher, 306 US 167, 177; Wisconsin v. J.C. Penney Co. 311 US 435. The fact that under Iowa law the sale is made outside of the state does not mean that the power of Iowa "has nothing on which to operate." Wisconsin v. J.C. Penney Co. supra. The purchaser is in Iowa and the tax is upon use in Iowa. The validity of such a tax, so far as the purchaser is concerned, "has been withdrawn from the arena of debate." Henneford v. Silas Mason Co., 300 US 577, 583; Southern P. Co. v. Gallagher, supra. It is one of the well-known functions

> of the integrated use and sales tax to remove the buyers' temptation "to place their orders in other states in the effort to escape payment of the tax on local sales." Henneford v. Silas Mason Co. supra. As pointed out in that case (p. 582), the fact that the buyer employs agencies of interstate commerce in order to effectuate his purchase is not material, since the tax is "upon the privilege of use after commerce is at an end." And see Southern P. Co. v. Gallagher, supra. Use in Iowa is what is taxed regardless of the time and place of passing title and regardless of the time the tax is required to be paid. Cf. McGoldrick v. Berwind-White Coal Min. Co. 309 US 33, 49.

Id. at 363.

Holmes, in support of its contention as to the substantiality of the question, cites **Independent Warehouses, Inc. vs. Scheele**, 331 U.S. 70 (1947) [Jurisdictional Statement Page 9]. The quotation from that case, which appears on Pages 9-11 of the Jurisdictional Statement, clearly permits the exaction of a tax when the property comes to rest within a state where it is deemed to be part of the general mass of property within the state and is thus subject to its taxing power. That is precisely what occurred in this case.

Holmes next cites the case of **Michelin Tire Corp. v. Wages**, 423 U.S. 276 (1976) [Jurisdictional Statement Page 11]. Again, in **Michelin**, as in the **Independent Warehouses, Inc.** case, the goods had come to rest and were no longer in transit and this Court found the goods in question to be taxable. Again, the same situation exists here.

Holmes next cites **dicta** from **Miller Bros. Co. v. Maryland**, 347 U.S. 340 (1954) [Jurisdictional Statement Page 11]. In actuality the **Miller** case concerns jurisdiction. The Court refused to sustain a use tax on a Delaware vendor without any connection with Maryland, after stating "[b]ut the course of decisions does reflect at least consistent adherence to one time-honored concept: that due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." **Id** at 344-345. In the **Miller** case, the Court recognized that certain activities or transactions carried on within a state, such as the use and sale of property, may give jurisdiction to tax whomsoever engages therein. **Id**. at 345. Holmes clearly engages in such activities.

Holmes next cites a state court case, **Service Merchandise Co., Inc. v. Tidwell**, 529 S.W.2d 215 (Tenn 1975) and a District of Columbia case, **District of Columbia v. W. Bell & Co., Inc.**, 420 A.2d 1208 (D.C.App. 1980). Although it is difficult to understand tax decisions of other jurisdictions without an examination of the underlying statutes and their interpretive regulations, the two cited cases are easily distinguishable from this case. In **Service**, the materials were still in interstate commerce at the time Tennessee wished to impose the tax. Here the catalogs had completed their interstate journey and had come to rest. There also exists a factual distinction between **Service** and this case, because in **Service** the materials were only sent upon the request of customers. 529 S.W. 201 at 217. Here they were non-expecting recipients, who had no prior knowledge that they were targeted by Holmes to receive a catalog. The court further found that it was the intention of the parties [i.e., **Service** and the requesting customer] that the interstate journey of the printed matter would continue until it reached the ultimate recipient. 529 S.W. 201 at 219.

The **Bell** case is also distinguishable. There the use tax statute is limited by its terms to "use, storage, or consumption," whereas the Louisiana Use Tax Statute also includes "distribution". The Court below found:

> After the catalogs were in Louisiana mailboxes they were not part of interstate commerce and became part of the property mass in this state. Distribution of the catalogs certainly constitutes "use" by Holmes under the statute and is subject to the tax.

McNamara v. D.H. Holmes, Co., Ltd., 505 So.2d 102, 105 (La. App. 4 Cir. 1987). [Jurisdictional Statement Appendix 7A.]

Conclusion

Wherefore, appellee respectfully submits that the judgment below rests on an adequate non-federal basis and should, therefore, be affirmed, or, in the alternative, the question upon which this case

depends is so unsubstantial as not to need further argument and the appeal should be dismissed.

All of the above and foregoing is thus respectfully submitted.

ROBERT G. PUGH
[COUNSEL OF RECORD]
PUGH and PUGH
Suite 1200
330 Marshall Street
Shreveport, Louisiana 71101-3051
(318) 227-2270

ATTORNEYS FOR THE MOVANT
SHIRLEY McNAMARA,
SECRETARY OF REVENUE AND TAXATION,
THE DEPARTMENT OF REVENUE AND TAXATION,
STATE OF LOUISIANA
APPELLEE

Number 87-267

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

D.H. HOLMES CO., LTD.,

Appellant

versus

SHIRLEY McNAMARA,
SECRETARY OF REVENUE AND TAXATION,
THE DEPARTMENT OF REVENUE AND TAXATION,
STATE OF LOUISIANA,

Appellee

ON APPEAL FROM THE COURT OF APPEAL,
FOURTH CIRCUIT,
STATE OF LOUISIANA

CERTIFICATE OF SERVICE

I, ROBERT G. PUGH, counsel of record for Shirley McNamara, Secretary of Revenue and Taxation, The Department of Revenue and Taxation, State of Louisiana, in the above-entitled proceeding, being a member of the Bar of the Supreme Court of the United States, do hereby certify that on this the 13th day of October, 1987, I served copies of Appellee's Motion to Dismiss or Affirm, by depositing three copies thereof in a United States mailbox, with postage prepaid, addressed to counsel of record for Appellant at his post office address. His name and address is as follows:

ANDREW RINKER, JR.
CHAFFE, McCALL, PHILLIPS
TOLER & SARPY
2300 Energy Centre
1100 Poydras Street
New Orleans, LA 70163-2300

All parties required to be served have been served.

ROBERT G. PUGH
COUNSEL OF RECORD
SHIRLEY McNAMARA,
SECRETARY OF REVENUE AND TAXATION,
THE DEPARTMENT OF REVENUE AND TAXATION,
STATE OF LOUISIANA
APPELLEE